THE LEGAL ASPECT OF THE SOUTHERN QUESTION.

IT is my purpose briefly to present certain points of law, most of them well settled, involved in discussions of the "Southern Question."

Even before the time of the present Constitution the country divided naturally into a "North" and a "South." In addition to the fact that the people of the two sections seemed to differ instinctively in their respective ideals of government, it was but natural that the manufacturing and commercial North should tend toward consolidation, and that the agricultural South should develop a love for local self-government. A trading community must have union; an agricultural need not. The conflict of opinion thus engendered between the Northern and Southern States upon matters of economy and government has constituted, in the different phases which it has from time to time assumed, the "Southern Question."

The Constitution, adopted as a compromise, is so elastic as to permit a construction by each section according to its own interest. Therefore upon nearly every question of constitutional interpretation we find the North contending for the powers of the federal government, and the South for the powers of the States.

The first fifty years and more of the legal history of the United States marks a gradual development of the powers of the national government. The Supreme Court decided in 1816 that the 25th section of the Judiciary Act, giving the court power to pass upon constitutionality of State laws, was constitutional.[1] Again, under the same section, it was held that the Supreme Court has appellate jurisdiction in causes where a State is a party.[2] Further, Congress asserted the power[3] to regulate slavery in the Territories, and to impose conditions upon the admission of States, powers which were afterwards denied in the "Dred Scott Case."[4] But the 8th

[1] Martin *v.* Hunter's Lessee, 1 Wheat. 304.

[2] Cohens *v.* Virginia, 6 Wheat. 264.

[3] In the Missouri Compromise, 1820.

[4] Dred Scott *v.* Sandford, 19 How. 393 (1856).

section of the Constitution, enumerating the powers of Congress, and especially the first clause, conferring the power "to levy and collect taxes . . . and provide for the . . . general welfare of the United States," was, together with the 18th clause, giving the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," the great battle-ground between champions of the different sections.

Representative controversies relating to this section of the Constitution are those concerning the power of Congress to levy duties for protection, as well as for revenue, and the power to establish a national bank. The tariff question led to the extreme stand taken by South Carolina, in 1829 and in 1832, that a State could nullify an act of Congress which it deems unconstitutional, thus following out the idea contained in the Virginia and Kentucky resolutions of 1798, 99. But the power of Congress in this regard was, nevertheless, asserted, and it was maintained by the President. The bank controversy terminated also in favor of the federal powers. Not only was it decided that Congress could create a bank, but it was also held that a State could not impose any burdens upon the bank by way of taxation or otherwise.[1]

With the development of the powers of the United States came limitations upon the powers of the States. For instance, they cannot annul a judgment of a federal court;[2] nor grant monopolies which interfere with the powers of Congress;[3] nor rescind their own grants or contracts.[4] Blow after blow was given to the cherished theories of the South, every stroke tending to establish that, within certain limits, the government of the United States has all the attributes of absolute sovereignty.

The growing importance of the slavery question, however, finally led the South to the view that such sovereignty as the United States possessed was conditional upon the consent of the States. Now, the Constitution divides sovereign powers between the Federal and the State governments. Those belonging to the latter constitute the true "State rights." Yet, although State

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[1] McCulloch *v.* Md., 4 Wheat. 316 (1819); Osborn *v.* Bank of U. S., 9 Wheat. 736 (1824).

[2] United States *v.* Peters, 5 Cranch, 115 (1809).

[3] Gibbons *v.* Ogden, 9 Wheat. 1 (1824).

[4] Fletcher *v.* Peck, 6 Cranch, 87 (1810); Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).

rights and National rights ought to be supreme within their respective limits, it was claimed that the former included the power to destroy the latter. This contention, first expressed in the Virginia and Kentucky resolutions and in the nullification ordinances of South Carolina, became the right of secession in 1861. It was this impracticable phase of "State rights" which was put at rest by the war. The tendency has since been to define more and more exactly the true line of demarcation between State and National sovereignty.

New questions required such a line to be carefully drawn. Under the recently adopted amendments to the Constitution (the XIIIth, XIVth, and XVth) there was danger that the North, in its desire to wipe out the injustice of years, would go altogether too far; while, on the other hand, it was likely that the South, if left to itself, would be slow to recognize that the days of slavery were over. The new *régime* gave to the negro civil and political rights equal to those of other citizens. By "political rights" is meant those which relate to the participation of the individual in the making of the laws. The term "civil rights" properly includes all legal rights not political; but with reference to discussions of the Southern question it has a much narrower meaning. What is meant seems to be those rights which affect the social status of the negro. Other civil rights, however fundamental, such as the right to acquire and hold property, the right to appear in court as witness or party, have occasioned little controversy.[1]

How far is the social condition of the negro under federal protection? All persons have an equal right to the privileges of public schools. The XIVth Amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." This clearly would prevent a State from excluding

[1] The Civil Rights Act of April 9, 1866 (14 Stat. at Large, c. 31) reënacted, with some modifications in the Enforcement Act of 1870 (§§ 16–19), declared that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to the same burdens and penalties, and none other; and provides for the punishment of any person who, under color of any law, statute, ordinance, regulation, or custom, shall deprive any inhabitant of a State or Territory of such rights. It was also declared that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by the white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property." See Rev. St., §§ 1977, 1978.

colored children from the public schools. If a law is passed providing for public education, no clause can be inserted which will discriminate against one race, so that it will not enjoy equal advantages with others.[1] But a State may establish separate schools for the whites and blacks, provided such schools offer substantially the same advantages.[2] In like manner laws prohibiting the inter-marriage of the white and black races are not within the XIVth Amendment, because they bear equally upon both.[3]

But the social equality sought to be established between the two races is far more likely to be disturbed by individuals rather than by States. May the federal government compel carriers, innkeepers, proprietors of places of amusement, and the like, to serve all persons without discrimination of color?[4] The famous "Civil Rights Cases,"[5] decided in 1883, held it could not. Against strong opposition on constitutional grounds, the "Act to protect all citizens in their civil rights" had been passed March 1, 1875, providing "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The act sought, therefore, to operate directly upon individuals, and the question was whether power was given to Congress by the

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[1] Ward *v.* Flood, 48 Cal. 36.

[2] Bertonneau *v.* Directors, 3 Woods, 177; Cory *v.* Carter, 48 Ind. 327; State *v.* McCann, 21 Oh. St. 198; People *v.* Easton, 13 Abb. Pr. N. S. 159; County Court *v.* Robinson, 27 Ark. 116; State *v.* Duffy, 7 Nev. 342; Cooley, Torts, 287, 288.

In Board of Education *v.* Tinnon, 26 Kan. 1, the right to establish separate schools was denied, on the ground that, unless a State can provide separate schools for each nationality, it cannot for any. In Ward *v.* Flood, 48 Cal. 36, it was held that, during the erection of buildings provided for in an act establishing colored schools, colored children must be admitted to the white schools. See on this subject a note by J. C. Harper, 10 Fed. Rep. 736.

Mandamus appears to be the proper legal remedy to enforce admission to schools. Cases *supra;* and High, Ex. Leg. Rem., § 332.

[3] *Ex parte* Kinney, 3 Hughes, 9; *Ex parte* Francois, 3 Woods, 367; *Ex parte* Hobbs and Johnson, 1 Woods, 537. See also Green *v.* State, 58 Ala. 190.

[4] Of course such public servants are within State control.

[5] 109 U. S. 3.

XIIIth and XIVth[1] Amendments to prevent private persons from making the discriminations mentioned. Bradley, J., speaking for the court, said that clearly no power could be derived from the XIVth Amendment. That amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." "This," he said, "does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the agreement. . . . Such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect." Speaking of the operation of the XIIIth Amendment, which abolished slavery, he said that this amendment, as distinguished from the XIVth, was "not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Therefore, neither an individual nor a State can impose slavery, or a badge of slavery, upon any one; but it cannot be said that the discriminations in the Civil Rights Act constitute either slavery or badges of slavery.

Thus it appears that the United States can do little to preserve the social equality of the negro from individual attack. Yet it should be remembered that Congress, in the exercise of some express power, may incidentally reach this matter. Under the power to regulate commerce, for instance, carriers may be required to afford equal accommodations to whites and blacks.[2] But aside from such instances it seems that, in general, no social discrimination whatever against the negro race, not amounting to slavery or a badge of slavery, if made by individuals, can constitutionally be reached by federal legislation.

Of course, such discrimination is often prohibited by the States themselves. Common carriers, innkeepers, and proprietors of

[1] The Civil Rights Act is not affected by the XVth Amendment, which concerns only the right to vote.

[2] Cooley, Torts, 283. See also Hall *v.* De Cuir, 95 U. S. 485.

places of public amusement are under a duty to serve the whole public alike, and it is clearly within the power of a State to enforce that duty. But upon the whole it must be said that legislation looking to the establishment of social equality between two races is not generally successful, and is not to be encouraged. Such matters had better be left to themselves; and it is not likely that the United States will attempt anything further in this direction, for only the excited period following the war can explain the faith which people had in the power of government to establish harmony and good-fellowship between the races, and the eagerness with which they followed the lead of men like Sumner, who, with the highest motives of philanthropy, attempted the impossible, and, it must be added, the unconstitutional.

There is, however, a field within which federal legislation is both constitutional and, to some degree, practicable. Citizens of the United States and of the States have certain political rights. It is claimed by many that these rights are denied to the negro in the Southern States; and, from the point of view of the lawyer, the "Southern Question" to-day practically means, What are these rights, and how are they to be protected?

We must first decide what rights are, from their nature, within the protection of the States, and what within the protection of the United States. The XIVth Amendment says that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and Congress is given power to enforce this prohibition by appropriate legislation. What are the privileges and immunities of citizens of the United States? Do they comprise all rights enjoyed by citizens, whether coming from the United States or not, or only rights derived from the United States? Very likely the XIVth Amendment intended the former; but the Supreme Court, when the question arose in the "Slaughter-House Cases," in 1872,[1] perceiving that thereby the jurisdiction of the United States would be enormously extended, shrewdly determined that only the latter were meant. The attributes of citizenship of the United States, as distinguished from citizenship of the States, arise, it was said, from the nature and essential character of the general government, and are, therefore, very limited indeed; while, on the other hand, the attributes of State citizenship are all those general and fundamental rights

[1] 16 Wall. 36.

secured by our system of law, which have not been excepted by the federal Constitution.

Now, by far the most important political right of a man in this country is the right to vote. But this right is derived from the States, not from the United States. The States fix the qualifications of voters. The United States confers suffrage upon no one, imposes no qualifications of its own. There is no occasion for a body of federal electors, except for choice of representatives, senators, President, and Vice-President. The Constitution[1] provides that the electors in each State for members of the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Senators are to be elected by the State legislatures.[2] The President and Vice-President are chosen by electors, appointed in such manner as the legislature of each State may direct.[3] Only in the last instance does the United States provide for the creation of an electoral body, and perhaps, strictly speaking, this body is composed of voters of the United States; but for the election of representatives and senators electoral bodies already in existence are employed.[4] Nor can it be said that the XVth Amendment confers the right of suffrage upon any one. It has merely given to citizens of the United States the constitutional right to "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. . . . The right to vote in the States comes from the States; but the exemption from the prohibited discrimination comes from the United States,"[5] and this exemption applies to all electors, whether State or National. It follows, therefore, that Congress may, as to the right to vote, prevent all discriminations by the States on account of race, color, or previous condition of servitude. Further than this Congress cannot interfere with State elections, unless the State, by withholding the equal protection of its general laws, fails to secure the right of suffrage to all voters alike.

Congress has, however, special powers with reference to federal

[1] Art. I., sec. 2. [2] Art. I., sec. 3.

[3] Art. II., sec. 1. [4] United States *v.* Reese, 2 Otto, 214 (1875).

[5] United States *v.* Cruikshank, 2 Otto, 542 (1875). But it should be noticed that incidentally the United States may confer the right of suffrage "by compelling the States to choose between excluding white men from the polls and admitting negroes, and striking the word 'white' from the laws by which the right of voting was regulated." 1 Hare, Am. Const. Law, 524; *Ex parte* Yarbrough, 110 U. S. 651, 665.

elections. The Constitution[1] says that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators." As a matter of speculation it may be said that Congress would probably have had *some* power to control federal elections without such express provision; for, in the event of a State's refusing to provide for an election, it is not likely that the resources of the Constitution would fail to preserve the government.

In early days it was thought that the power could be exercised only when necessity demanded. Hamilton apparently saw merely a reservation of a right to the national government "to interpose whenever extraordinary circumstances might render that interposition necessary to its safety."[2] At all events, it was thought that the power would not be exerted unless occasion absolutely required.[3] It has since been settled, however, that congressional action is not thus limited. In 1842 an election law was passed providing for the election of representatives by districts, but, owing to the great opposition of the States and an adverse report by Stephen A. Douglas as to its constitutionality, it remained a dead letter till 1862, when it was reënacted.[4] In 1872 came the act fixing the time for election of representatives on the Tuesday after the first Monday in November.[5] It is hard to see why Congress may not at will prescribe the times, places, and manner of holding federal elections.

Some doubt may arise as to what is a regulation of the "manner" of holding an election. "Times" and "places" are precise terms; but "manner" is necessarily vague. Is it part of the "manner" that an election shall be orderly, that there shall be no intimidation, bribery, prevention from voting, or violence of any kind? Without attempting to be very precise, one can say that Congress may make any provision that can justly be said

[1] Art. I., sec. 4.

[2] Federalist, No. 59.

[3] 1 Story Comm. (3d ed.), § 816. See also the remarks of Senator Whyte on the Edmunds Resolutions, 8 Cong. Rec. 998 (1879). The State of North Carolina refused to ratify the Constitution unless the power of Congress was expressly limited. Seven out of thirteen States protested against the clause.

[4] Rev. St., § 23.

[5] Rev. St., § 25.

to contribute directly to the accuracy and fairness of the result.[1]

What remedies has Congress afforded for infringements of the right to vote? In the first place, the President has been given power to call out the militia, whenever he thinks necessary, to suppress any combination or conspiracy or violence which deprives any person or class of persons of the "rights, privileges, and immunities," or of the "equal protection of the laws," guaranteed by the Constitution, if the State is unable or refuses to give adequate protection.[2] This act is evidently constructed with special reference to the XIVth Amendment, which prohibits the States from denying to any one the equal protection of the laws. How does it affect the right to vote? We have seen that suffrage may be conferred by the States upon whomsoever they will, provided that they do not discriminate on account of race, color, or previous condition. The effect of the XIVth Amendment is to secure to the body of voters the equal protection of the laws by which they may enjoy the right bestowed upon them. Although the act in question provides an extreme remedy for all State action contrary to the XIVth Amendment, it was probably designed with special reference to the right to vote.

The statute declares that a failure or refusal by the State to secure the equal protection of the laws amounts to a positive denial. If that theory is correct, the act is constitutional; but, if it is not, the act attempts to cover something more than violations by a State of the XIVth Amendment, and it seems that the discrimination taken in the Civil Rights Cases applies, viz., that since the prohibition in the XIVth Amendment rests only upon

[1] *Ex parte* Yarbrough, 110 U. S. 651; McCrary on "Our Election Laws," 128 N. A. Rev. 449 (1879). Further legislation in control of elections has been mooted from time to time. See the debate on the Edmunds Resolutions in 1879, 8 Cong. Rec. 839–848, 885–893, 954–962, 997–1030.

In this connection may be noticed the bill introduced by Senator Sherman, Jan. 8, 1889, to regulate "the times, places, and manner of holding elections for representatives in Congress." It provides for a "Board of State Canvassers" in each State, and an "Electoral Board" for each congressional district. These federal officers are to register and count votes, declare results, and correct irregularities in elections for representatives to Congress. The bill also provides that these boards may conduct elections for presidential electors in the same way at the national expense, if the State desires. The consent of the State must be given, because the choice of presidential electors is strictly a State affair. The bill is probably constitutional, and is an example of how far Congress may go in regulating the manner of elections.

[2] Act Apr. 20, 1871, 17 Stat. at Large, c. 22, § 3; Rev. St., § 5299.

the States, the federal government can interfere only when the States deny the rights guaranteed by the amendment. But it is not worth while to go further into this matter, since the power to employ militia is of little present importance.

Let us look for a moment at further attempted remedies. May 31, 1870, an "Enforcement Act" was passed,[1] the first section of which declared all citizens of the United States who are otherwise qualified to vote at any municipal, State, or federal election, shall be allowed to vote at such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. The succeeding sections provided a criminal remedy for the following offences, besides, in most instances, a civil remedy to the party aggrieved. When a person or officer denies under authority of the State to any one, on account of race, color, or previous condition of servitude, an equal opportunity with others to do an act required as a qualification for the right to vote (sect. 2); when an officer wrongfully refuses, as "aforesaid," to count the vote of a person making affidavit that he was prevented under color of State authority from doing the act "aforesaid" (sect. 3); preventing by bribery, threats, or intimidation, or combining to prevent, the doing of the act "aforesaid" (sect. 4); hindering or attempting to hinder, by bribery or threats, any person from exercising the rights of suffrage guaranteed by the XVth Amendment (sect. 5); combinations to violate the act, or to prevent any person from enjoying the rights and privileges secured by the Constitution of the United States, or to injure any person for having enjoyed the same (sect. 6); illegal voting, bribery, or intimidation of voter or officer (sect. 19); illegal registering, and illegal refusal to perform any duties relating to such registration in elections for representatives (sect. 20).[2]

Any person deprived of an office, except that of elector, and of representative to Congress or State legislature, may recover it in the United States Circuit or District Courts (sect. 23).

The validity of certain sections of the act was tested in a

[1] 16 Stat. at Large, c. 114. The President has power to enforce the provisions of the act with the army and navy of the United States, and with the militia.

[2] The design of this act is carried somewhat farther in St. Apr. 20, 1871, c. 22, § 1. By the same act certain combinations are made crimes.

number of cases, chief among which are United States *v.* Reese[1] and United States *v.* Cruikshank.[2] In the first case an indictment was found under the 3d and 4th sections against inspectors of a municipal election in Kentucky, for refusing to receive and count the vote of a United States citizen of African descent. It was held that these sections were unconstitutional, because they were not expressly limited to operate upon discriminations on account of race, color, or previous condition of servitude; for the only right given by the United States, with reference to voting, is the right to exemption from such discrimination by a State. Practically the same reason operated to make an indictment defective in United States *v.* Cruikshank. There, an indictment was found under the 6th section for intent (among other things) to prevent citizens from voting at a State election, and to put certain persons in fear of great bodily harm because they had previously voted at a State election. No interference with a right under federal protection was described; and even if an interference on account of color might be shown, it was not charged that the offence was committed under the authority of the State.[3]

It has been said that infringements of the right to vote must be by a State, in order to come within the XIVth and XVth Amendments. In federal elections, as has been seen, wrongful acts of individuals may be prevented by Congress, because of the general power over such elections given by art. I., sect. 4, of the Constitution. But what is meant by "State" in the XIVth and XVth Amendments? Are the doings of a State officer or the decisions of the courts the acts of the States? Or, is the prohibition directed solely against legislation? It would seem that the view stated in the "Civil Rights Cases" is the correct one. Speaking of civil rights in general, the court say that "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful act of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."[4] Acts done under color of State authority are, therefore,

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[1] 2 Otto, 214 (1875).

[2] 2 Otto, 542 (1875).

[3] For this reason, the 5th section also of the Enforcement Act, protecting the exercise of the rights of suffrage guaranteed by the XVth Amendment, seems unconstitutional, because it is aimed at individuals, not States.

[4] 109 U. S. 3, 17.

acts of a State. This puts a wide, but perhaps a not too wide, construction upon the amendments.

Although the constitutional prohibitions rest only upon a State, yet they may be enforced by the punishment of any individual who acts under color of State authority.

Senator Sherman, in the debate in 1870, on the passage of the Enforcement Act, probably stated the case correctly when he said, "If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it."[1]

But suppose the State is unable or neglects to protect the civil rights of citizens; shall that be deemed a denial of those rights? It was so declared in the Militia Act,[2] before cited. Perhaps it is not too great a stretch to call this a denial, but it is very doubtful. Another view which extends still farther the scope of the amendment is that "State" means all those who act as agents of the State, whether they keep within their powers or exceed them.[3] This is not the accepted view.

It is not necessary for Congress to wait for legislative or other acts by a State obnoxious to the constitution; but provision may be made for them in advance.[4]

Several other statutes must be mentioned. They relate mainly to certain conspiracies. Conspiring or going in disguise on the highway or on the premises of another, under color of State authority, for the purpose of depriving any one of the equal protection of the laws or of interfering with the right to advocate or vote for President, Vice-President, or representative, renders the offender liable to the party injured in a civil action.[5] Under principles already stated, this statute seems constitutionally sound. Not as much can be said of the statute[6] which makes it criminal to conspire or go in disguise as above for the purpose of depriving any one of the equal protection of the laws, or of equal privileges and immunities under the laws, or of preventing the State authori-

[1] Cong. Globe, 1869–70, p. 3663.

[2] Act Apr. 20, 1871, c. 22, § 3; Rev. St., § 5299.

[3] United States *v.* Reese, 2 Otto, 214, 251, 252, per Hunt, J.

[4] Civil Rights Cases, 109 U. S. 3, 13; *Ex parte* Virginia, 100 U. S. 339; Virginia *v.* Rives, 100 U. S. 313, 318; United States *v.* Cruikshank, 92 U. S. 542.

[5] Rev. St., § 1980.

[6] Rev. St., § 5519.

ties from securing equal protection to all, whether such acts are under color of State authority or not. At any rate, it cannot be supported under the XIVth Amendment, which does not apply to individuals.[1] No objection, however, can be taken to the further enactment,[2] that conspiring to prevent any legal voter from voting for elector or member of Congress shall be criminal, because federal elections are subject to congressional control under the power to regulate the manner of holding them.

The remaining legislation affecting the right to vote consists chiefly of provisions for supervisors and employment of marshals at federal elections.[3]

The conclusions with regard to suffrage may be summed up as follows: —

1. *In General.* — The right to vote is conferred by the States, not by the United States. Hence a State may bestow the right upon any class to the exclusion of others, provided that no discrimination shall be made on account of race, color, or previous condition of servitude; but if suffrage is not conferred upon any class, then the State representation is to be proportionally cut down according to the provision in the XIVth Amendment.

2. *State Elections.* — Congress may interfere by appropriate corrective legislation whenever a State denies to any one the right to vote on account of race, color, or previous condition of servitude.

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[1] 1 Hare, Am. Const. Law, 526.

[2] Rev. St., § 5520.

[3] Rev. St., §§ 2011–2031. In cities and towns of over 20,000 inhabitants, two citizens may apply to the circuit judge for the appointment of two supervisors of different parties, who shall attend at times of registration and voting for election of representatives to Congress, examine and verify lists of voters, make challenges, scrutinize and count ballots, inspect methods of voting, and forward to the chief supervisor, appointed by the court, all certificates and returns required by him. The chief supervisor may take testimony in regard to any interference with the performance of their duties, to be submitted to the clerk of the House of Representatives.

Upon similar application to the marshals of the district, deputies will be appointed, who, together with the marshals, shall protect the supervisors and preserve order. Both they and the supervisors may arrest for all offences against the laws of the United States committed in their view, or in the view of the supervisors.

Besides these provisions for cities, ten citizens in any county or parish may apply to the circuit judge for the appointment of supervisors, who shall have, however, no authority to do more than be in the immediate presence of the officers holding the election, and to witness all proceedings, but not to make arrests.

The employment of marshals and deputies to preserve order at the elections in large cities has not been wholly a success. The charge is freely made that they work in the interest of party.

Moreover, Congress may thus interfere when a State denies to any person the equal protection of the laws. This means, so far as the right to vote is concerned, that, under color of State authority, no restrictions, not bearing equally upon all, shall be imposed upon the exercise of the suffrage which the State has bestowed.

A denial by a "State" is a denial supported by State authority in the shape of laws, customs, or judicial or executive proceedings; and possibly inability or neglect to protect the rights guaranteed by the Constitution amounts to a denial of them.

There can be no federal interference for any other purpose, such as to prevent fraud, intimidation, or violence by individuals.

3. *Federal Elections.* — Congress may interfere as in State elections, and also, under art. I., sect. 4, of the Constitution, may prevent and punish all wrongful acts, by whomsoever committed, whenever such a course can justly be said to contribute to accuracy and fairness.

Other political rights besides the right to vote may be guarded by the United States. The right to hold office is protected by statute, making it both a civil [1] and a criminal [2] offence to conspire to prevent, by force, intimidation, or threat, any person from holding or discharging the duties of an office under the United States.

The fourth section of the Civil Rights Act of 1875 prohibited disqualification from jury service because of race, color, or previous condition of servitude. This has been held constitutional,[3] because corrective of State legislation making a discrimination obnoxious to the XIVth Amendment. The right to assemble for the purpose of petitioning Congress for redress of grievances, or for any other purpose connected with the power or the duties of the national government, is an attribute of national citizenship, and as such to be protected by the United States.[4] But the right to assemble merely is not within federal protection. The same is true of the right to bear arms for a lawful purpose.[5]

Closely connected with the subject of the security of suffrage in the South is the matter of contested elections. How can the result of an election which has been conducted in defiance of the law be impeached?

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[1] Rev. St. 1980. [2] Rev. St. 5518. [3] *Ex parte* Virginia, 100 U. S. 339.
[4] United States *v.* Cruikshank, 2 Otto, 542. [5] *Ib.*

The remedies are usually statutory, but a contest as to the seat of a member of a legislature is generally controlled by the rules and orders of the legislature itself. At common law the remedy is by *quo warranto*, filed on behalf of the State by the public prosecutor, to inquire into and correct the alleged usurpation of a public office. Originally the proceeding was criminal, but it is now regarded as practically civil.[1]

The two houses of Congress, however, are the judges of the qualifications of their own members.[2] No particular rule seems to have been adopted by the Senate, but each case has been investigated in the manner which appeared best suited to it. The practice is to refer to a committee.[3] Few questions of fact arise in senatorial contests, because senators are chosen by State legislatures, which decide for themselves the qualifications of their members, into whose election the United States has no power to inquire.

The House of Representatives for a long time had no settled method of contesting elections. A few early laws were passed and expired, and from 1804 to 1850 there was practically no law on the subject. Procedure was in great confusion.[4] It should be said, however, that the matter is hardly a subject for legislation, because Congress is not bound by any law it may pass. But, in 1851, legislation was again attempted, and various acts have since been passed, which partially provide a procedure in cases of contested elections. Notice must be given to the seated member, by the contestant, within thirty days after the election has been determined by the proper authority, specifying particularly the grounds of the contest.[5] Thirty days are then given for an answer to be served on the contestant.[6] Ninety days[7] are given to the parties for the taking of testimony before certain prescribed officers, which, after it is taken, is sealed up and sent to the

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[1] McCrary, Elections (3d ed.), §§ 389, 390.

[2] Const., Art. I., sec. 5.

[3] "The Mode of Procedure in Cases of Contested Elections," by H. L. Dawes, 2 Am. J. Soc. Sci. 56, 58.

[4] The New Jersey contested election in 1839 almost produced a state of anarchy in the House.

[5] Rev. St., § 105.

[6] Rev. St., § 106.

[7] The contestant has forty, the seated member forty, and the contestant the remaining ten for rebuttal.

clerk of the House, who decides, on failure of the parties to come to an agreement, how much shall be printed.[1] Briefs are then filed,[2] and the matter is referred to a committee, who make a report, which is either adopted or rejected by the House. Thus the case is disposed of; but it is needless to say that the vote on the report is frequently a party one.

The principal grounds for setting aside an election are intimidation and fraud. If the true result of an election has been changed, or cannot be ascertained with certainty from the returns, because of violence or intimidation, the election should be set aside. Whether the contestant can be counted in is a difficult question. McCrary, in his work on elections,[3] says: "It must, however, in the nature of things, be a rare case in which the votes of persons prevented from voting by violence or intimidation can be counted for one or the other candidate, as if actually cast. In order that a vote not cast shall be counted as if cast, it must appear that a legal voter offered to vote a particular ballot, and that he was prevented from doing so by fraud, violence, or an erroneous ruling of the election officers. Just what is to be understood by offering to vote, is not, perhaps, perfectly well settled. If a voter approaches, or attempts to approach, the polls, for the purpose of depositing his ballot, and is driven away, or, by violence, intimidation, or threats, prevented from the actual presentation of his ballot to the proper officer, and if he used proper diligence in endeavoring to reach the polls and deposit his ballot, and was not intimidated without sufficient reason, the better opinion seems to be that his vote may be counted. But, of course, voters who do not present themselves at the polls and offer their ballots, or who do not attempt to go to the polls at all, or, attempting, fail, without reasonable cause, cannot, in any case, ask that their vote be counted."[4]

The employment of soldiers to keep order at the polls is always hazardous, because, if their presence causes a number of voters, sufficient to affect the result, or to render it doubtful, to abstain from voting from reasonable motives, the election ought to be set aside, although there is no actual violence.[5]

An election should be treated as a whole, in passing upon the

[1] Rev. St., §§ 106–127.
[2] Acts 2d Sess. 49th Cong. 445.
[3] McCrary, Elections (3d ed.), § 523.
[4] Newcum *v.* Kirtley, 13 B. Monroe, 515.
[5] Giddings *v.* Clark, 42d Congress.

question whether it has been fair and free; that is, do the returns give the true ultimate result, although certain precincts, or voting places, are necessarily thrown out of the count?[1] The question always is, has the great body of electors had a fair opportunity to express their choice? This same criterion applies to fraud as well as to intimidation and violence.

One further matter presents itself,—one that may assume some importance in the future. It has been said that a State may confer the right of suffrage upon whom it pleases, provided that no discrimination is made on account of race, color, or previous condition of servitude. "But when the right to vote at any election for the choice of electors for President and Vice-President, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens, twenty-one years of age, in each State."[2] How far can a State under this amendment impose qualifications upon voters without cutting down its representation? Suppose, for instance, that some of the Southern States should require that voters be able to read and write,—a requirement which would disfranchise a large proportion of negroes and many whites.[3] At first blush it seems that the representation must necessarily be reduced, since the words of the amendment, "denied or in any way abridged," appear very comprehensive. But it has been pointed out[4] that qualifications are made in many States which prevent a large number of persons from voting, and yet the representation is not consequently diminished. In New York at least three per cent. of the male population above twenty-three years of age is prevented from voting by the laws of residence and registration. In Massachusetts the educational qualification reduces the voting population one-sixteenth. It is clear that the universal understanding in this country does not apply the amendment to

[1] McCrary, Elections (3d ed.), § 529.

[2] Const. XIVth Am., sec. 2; Rev. St., § 22.

[3] Amendments to the State constitutions have recently been proposed in the legislatures of Alabama and South Carolina, providing for an educational test, but, it must be admitted, with little hope of success. See 47 Nat. 511.

[4] 47 Nat. 468.

such cases as these. Ought any different rule to be invoked in such extreme cases as South Carolina or Alabama, where an educational test like that in Massachusetts would reduce the voters about one-half? It is difficult to say what view would prevail, since Congress, having the power to apportion representation among the States and to judge of the election and qualifications of its members, could construe the amendment as it pleased; and such construction probably could in no way be revised by the Supreme Court. But we can judge somewhat how the Supreme Court would treat the matter, if it ever could be in issue there, from the interpretation given to analogous clauses of the Constitution. In section 1 of the XIVth Amendment, a State is forbidden to "deprive any person of life, liberty, or property without due process of law." With regard to property, "deprive" is construed to mean an actual taking away of some property right. The State may regulate the use of property, and not come within the prohibition.[1] In the same way the clause forbidding a State to impair the obligation of contracts[2] is interpreted that there must be an actual taking away of a contract right or of a substantial remedy thereunder.[3] A law which decreases the value of the contract right does not necessarily come within the clause. Perhaps a good way to express the rule is to say that it is a subtraction of an integral part of the property or contract right which is prohibited. The best analogy of all, however, is found in the interpretation of the clause that no State shall pass an *ex post facto* law,[4] made in the "Test Oath Cases,"[5] which involved the constitutionality of statutes requiring a person to take an oath that he had always been loyal to the United States, as a qualification for holding office or pursuing certain callings. If the oath was intended as a prohibition from certain offices or professions, and designed to punish past offences, then it was within the clause for-

[1] Compare the cases where the police power has been exercised, even to the extent of practically depriving the owner of all, or nearly all, the benefits of ownership. Mugler *v.* Kansas, 123 U. S. 623 (1882). See also the Oleomargarine Cases. People *v.* Marx, 99 N. Y. 377 (1885); Powell *v.* Pa., 127 U. S. 678 (1887); State *v.* Addington, 12 Mo. App. (1882).

[2] Const., Art. I., sec. 10.

[3] Fletcher *v.* Peck, 6 Cranch, 115; Calder *v.* Bull, 3 Dall. 386; Bronson *v.* Kinzie, 1 How. 311.

[4] Const., Art. I., sec. 10.

[5] *Ex parte* Garland, 4 Wall. 333; Cummings *v.* Mo., 4 Wall. 277; Peerce *v.* Carskadon, 16 Wall. 234; Kring *v.* Mo., 107 U. S. 221; Murphy *v.* Ramsey, 114 U. S. 40–44.

bidding *ex post facto* laws; but if it was designed as a real qualification, then it was constitutional. In most of the cases the court decided that the oath was not a real qualification.

Gathering what we can from these analogies, we infer that the word "denied" means an absolute refusal to confer the right of suffrage upon certain persons, and that "abridged" means a partial denial. Suppose a State refuses to let any one-legged men vote; that would be a denial. And suppose the State refuses to let one-legged men vote in all elections; that would be an abridgment. Now, a requirement which an average person could meet, if he chose to, would amount to neither a denial nor an abridgment. Indeed, we may say, in general, that any qualification on the right to vote which can be acquired by an exercise of average ability, is permissible without entailing a loss of representation. A qualification which goes farther than this must necessarily, to some extent, amount to a denial or an abridgment of the right to vote. The question should be as it was in the "Test Oath Cases," — Is this requirement really a prohibition or a qualification?

Whatever argument can be drawn from the intention of the country in adopting the XIVth Amendment favors this view. The desire was to prevent discriminations against the negro race. Now, it is a fact patent to every one that an educational qualification would not operate solely upon the negro. The number of white illiterates in some of the Southern States is very great.

In conclusion, I may say that my attempt has been merely to state, in a collected form, the law bearing upon the "Southern Question." It should be remarked, however, that although it may enter much into public discussion, the law will probably become a less and less distinctive factor in the adjustment of Southern troubles, which will be left to work themselves out on social and economic lines. Nevertheless, so long as legislative interference is mooted, it is necessary to have some knowledge of what may be done under the laws of the Union and the States.

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